



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

September 7, 2004

Mr. Ignacio Perez  
Assistant City Attorney  
City of McAllen  
1501 Pecan Boulevard  
McAllen, Texas 78501

OR2004-7588

Dear Mr. Perez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208616.

The City of McAllen (the "city"), which you represent, received a request for copies of "all fire department correspondence (letters, memorandums, and e-mails) written by (five named individuals) for the period of April 1, 2004 to present date." The requestor also seeks two additional categories of correspondence, as well as "[a] copy of the most recent fire department overtime expense report."<sup>1</sup> You state that the city is releasing some responsive information, but claim that certain information within the responsive documents is excepted from disclosure under sections 552.101, 552.106, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written

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<sup>1</sup>By e-mail dated June 24, 2004 and received by the city on June 25, 2004, the requestor withdrew her request for three additional categories of information.

request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

You state that the city received the request on June 10, 2004. However, you did not submit the written request to this office until July 20, 2004. Although the requestor modified her request and you state this amended request was received by the city on June 25, 2004, you do not allege, nor do the documents reflect, that the city requested any clarification or narrowing of the request. *See* Gov't Code § 552.222(b) (governmental body may seek to clarify request if it is unclear what information is being requested or to seek to narrow request if large amount of information has been requested). Thus, the city's deadline for requesting a ruling and submitting necessary information was not tolled. *See* Open Records Decision No. 663 (1999) (discussing requests for clarification and their effects on deadlines). Even if we were to find that the city's deadline was tolled from the date the clarification was received, the city nonetheless did not timely submit the written request for information. Consequently, we find that the city failed to provide the information required by section 552.301(e) within the mandatory fifteen-business-day period.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). We note that sections 552.106 and 552.108 of the Government Code are discretionary exceptions under the Public Information Act (the "Act") and do not constitute compelling reasons sufficient to overcome the presumption of openness. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 470 (1987). Therefore, you may not withhold the requested information under sections 552.106 or 552.108. However, this office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Sections 552.101 and 552.117 constitute compelling reasons.

Section 552.101 which excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a fire fighter's civil service file that the civil service director is required to maintain, and an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g). In cases in which a fire department investigates a fire fighter's misconduct and takes disciplinary action against the fire fighter, it is required by section 143.089(a)(2) to place all investigatory records relating to the

investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the fire fighter's civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.- Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are "from the employing department" when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See Id.* §§ 143.051-.055. Such records are subject to release under chapter 552 of the Government Code. *See Id.* § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to an fire fighter's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to an fire fighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.-- San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.--Austin 1993, writ denied).

In this case, although you state that "the disclosure of information from the files of fire fighters serving in cities that have adopted chapter 143 of the local Government Code . . . is restricted by 143.089 . . .," you have not marked the information that you indicate is held in the files of firefighters. Nor are we able to determine whether the documents you submitted to us for review are part of the files maintained by the fire department under section 143.089(g). Thus, to the extent any of the submitted documents are held in files maintained pursuant section 143.089(g), the city must withhold these documents under section 552.101 in conjunction with section 143.089 of the Local Government Code. However, to the extent the documents are maintained by the fire department outside of the department's personnel files, the information is not confidential under section 143.089(g). We will therefore address your remaining arguments based on the contingency that the submitted documents exist outside of the fire department's personnel files.

You claim that certain information in the Request Notification Sequence e-mail is subject to section 552.117. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, the employee at issue made a timely election for confidentiality under section 552.024. Therefore, the city must withhold the information we have marked under section 552.117(a)(1).

In summary, if the submitted information is part of a section 143.089(g) file, then the city must withhold the information under section 552.101. If the information at issue is maintained by the fire department outside of the department's personnel files, the information is not confidential under section 143.089(g). In that event, you must withhold the information we have marked under section 552.117(a)(1) and release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

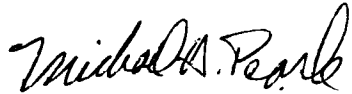
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Pearle". The signature is fluid and cursive, with the first name "Michael" being more prominent.

Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/jh

Ref: ID# 208616

Enc. Submitted documents

c: Ms. Patsy Rogers  
c/o Mr. Ignacio Perez  
Assistant City Attorney  
City of McAllen  
1501 Pecan Boulevard  
McAllen, Texas 78501  
(w/o enclosures)